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Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ARIZONA POWER AUTHORITY, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE* [1]

Whether Section 7(a)(2) of the Endangered Species Act ("ESA" or "the Act") overrides statutory mandates or constraints placed on an agency's discretion by other Acts of

[1] The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *Amici* state that their counsel authored this brief and *Amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *Amici* made a monetary contribution to its preparation.

Congress is of exceptional national importance and critical to States, to nationally significant agricultural and business interests, and to entities, such as *Amici*, who are responsible for delivering power and water to tens of millions of people. All parties have consented to the filing of this Brief.

Amici Arizona Power Authority, Central Arizona Water Conservation District, and Utility Water Act Group's members provide water or power, either directly or indirectly, to States, tribes, municipalities, public agencies, irrigation and power districts, homes, businesses, and other customers. *Amici* operate and own permitted facilities in States that hold delegated Clean Water Act ("CWA") permitting authority and are therefore concerned about the interplay between the CWA and the ESA. Reading ESA Section 7(a)(2) to apply to the Environmental Protection Agency's ("EPA") nondiscretionary delegation of CWA permitting authority to the States and, by extension, to arguably trump the long-standing federal allocations of water and power that *Amici* and their customers depend upon to meet their needs, would have devastating implications for *Amici's* future water and power operations.

The decision creates uncertainty about an agency's obligations under ESA Section 7(a)(2) despite the limitations of the agency's own organic authority. The decision, therefore, threatens federal water and power projects throughout the west, including those that depend upon the water and power facilities of the Colorado River. The decision also threatens the Utility Water Act Group's members who operate in, and hold National Pollutant Discharge Elimination System ("NPDES") permits issued by, Arizona and other delegated States. Those members face uncertainty, disruption and delay as States grapple with the potential ramifications of this decision.

Amici's concern is not only with the impact of the panel's decision on the NPDES permit program, but also the impact

the decision may have on *Amici's* future water and power operations and rights to water and power under contracts they have entered into with federal entities. Whether ESA Section 7(a)(2) overrides statutory mandates or other binding legal obligations of federal agencies is critical to the security of *Amici's* rights and to the well-being of the communities and customers that they serve.

Arizona Power Authority

The Arizona Power Authority ("APA") is a corporate and political body of the State of Arizona established by the legislature in 1944. ARIZ. REV. STAT. §§ 30-101, *et seq.*, §§ 45-1701, *et seq.* The APA is responsible for acquiring and marketing the State of Arizona's 377-megawatt share of power from Hoover Dam and then transmitting this power over the Parker-Davis and Pacific Intertie transmissions systems.

The APA serves 32 wholesale customers, including towns, irrigation, water and electrical districts throughout Arizona, with power—electrical energy generated from the flow of the Colorado River—from the Hoover Dam. Any interruption or diminution of the delivery of power from Hoover Dam would significantly impact the APA's delivery of power to its customers.

Central Arizona Water Conservation District

The Central Arizona Water Conservation District ("CAWCD") is a political subdivision of the State of Arizona that was formed for the purpose of contracting with the United States for the delivery of the water supply and for the repayment of the State's share of the costs of constructing the Central Arizona Project ("CAP"). This Court's decree in *Arizona v. California* confirmed Arizona's right to consump-

tively use 2.8 million acre-feet ("maf")[2] of Colorado River water annually. *Arizona v. California*, 373 U.S. 546, 577 (1963) (opinion) and 126 S. Ct. 1543 (2006) (amended decree) (hereinafter "Decree"). Despite the Decree, however, Arizona could not fully use its Colorado River water because it lacked a water delivery system capable of transporting Colorado River water to the heavily populated regions of central and southern Arizona. Accordingly, in 1968, Congress enacted the Colorado River Basin Project Act, which authorized the Secretary of the Interior ("Secretary") to construct the water delivery system known as the CAP. 43 U.S.C. §§ 1501, *et seq.* ("Basin Project Act").

In order to provide for CAP operation and repayment, the Basin Project Act also gave the Secretary the authority to enter into a master contract with an Arizona organization having the power to levy assessments against all taxable real property within its boundaries. 43 U.S.C. § 1524(b)(1). In response, the CAWCD was formed in 1971 as a municipal corporation of the State of Arizona. ARIZ. REV. STAT. §§ 48-3701, *et seq.* CAWCD comprises Maricopa, Pinal and Pima counties and encompasses roughly 80 percent of Arizona's water users and taxpayers. In 1972, CAWCD entered into a master contract with the Secretary, providing for the repayment of reimbursable CAP construction costs and the delivery of the CAP water supply. CAWCD is also responsible for operating and maintaining the CAP aqueduct system.

Pursuant to the Basin Project Act, its own Arizona enabling legislation, and the master contract, CAWCD has entered into numerous subcontracts for delivery of CAP water supplies to agricultural irrigation districts and municipal and industrial entities in central and southern Arizona. CAWCD's

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[2] An acre-foot equals 325,851 gallons—the amount of water needed to cover one acre of land with water one foot deep. One acre-foot of water can supply the household needs of a four-person family for one year.

subcontractors include the cities of Phoenix, Tucson, Scottsdale, Mesa, Peoria, Glendale, Tempe and Chandler, all of which depend upon the delivery of Colorado River water by means of the CAP. In 2006, CAWCD delivered over 1.5 maf of Colorado River water to agricultural, municipal, and tribal entities served by the CAP. Overall, Colorado River water delivered by the CAP makes up about one-third of Arizona's annual renewable water supplies.

Utility Water Act Group

The Utility Water Act Group ("UWAG") is an ad hoc group of 211 individual energy companies and three national trade associations of energy companies, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers nationwide. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned (municipal and State) energy utilities in 49 States representing 16 percent of the market.

UWAG's purpose is to participate on behalf of its members in agency rulemakings under the CWA and in litigation arising from those rulemakings. On occasion, these activities have involved both of the agencies and statutes at issue here. For example, UWAG has filed comments on the Memorandum of Agreement between the EPA and the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") regarding implementation of the ESA in

CWA-related matters. *See* Draft Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and the Endangered Species Act, 64 Fed. Reg. 2742 (proposed Jan. 15, 1999). UWAG members are directly affected by NPDES permit decisions made by EPA and delegated States under the CWA. UWAG, in turn, is interested in consistent, timely, and objective permit decisions for its members, as well as a clear delineation of authority between EPA and FWS on implementation of their respective statutory obligations. In addition, UWAG members are subject to many other environmental statutes, most of which also impose non-discretionary standards on the federal agencies charged with their administration. The potential application of the Ninth Circuit decision to those statutes is of concern to UWAG members.

Amici jointly have broad and united interests in urging this Court to reverse the Ninth Circuit's erroneous decision. ESA Section 7(a)(2) does not override a federal agency's organic law or its contracts with non-federal parties. A proper resolution of this issue is essential.

SUMMARY OF ARGUMENT

Amici file this brief on writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005) in support of Petitioners, the EPA and the National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association.

The Ninth Circuit's decision invalidated EPA's transfer of the NPDES permit program to Arizona. Under the CWA, the NPDES permit program is administered by EPA unless the program is transferred to a State. If the State meets nine exclusive criteria laid out in CWA Section 402(b), the CWA provides that EPA "shall approve each such submitted program unless [it] determines that adequate authority does not exist" to ensure that the nine specified criteria are satisfied. 33 U.S.C. § 1342(b). The criteria set by Congress do not permit EPA to impose additional conditions.

Section 7(a)(2) of the ESA requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat. ESA Section 7(a)(2) consultation is required for actions "in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added); *see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996). Thus, Section 7(a)(2)'s consultation requirement is properly construed to apply only to the exercise of EPA's existing discretionary authority—it does not override the Congressional mandates explicitly set out in CWA Section 402(b). Because EPA lacked the discretion to deny transfer of the NPDES permit program to Arizona if Arizona met the nine enumerated conditions of CWA Section 402(b), EPA's decision was not "agency action" within the meaning of ESA Section 7.

If the Ninth Circuit decision stands, the ESA would become a federal "super law," modifying not only EPA's obligation under the CWA, but arguably overriding every statutory mandate applicable to federal agencies. The decision is contrary to agency regulations, settled law of other circuits, and prior decisions of the Ninth Circuit and sets an important precedent on the relative powers and constraints of the ESA and the CWA (and, by extension, other federal laws). This Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING APPLYING ESA SECTION 7(A)(2) TO CWA SECTION 402(B) CONTRADICTS CONGRESS'S CLEAR INTENT IN THE CWA.

Section 402(b) of the CWA provides that the EPA "shall approve" the permitting program submitted by a State unless EPA "determines that adequate authority does not exist" to enable the State to administer the program in accordance with nine specific criteria. Accordingly, a State seeking to administer its own NPDES permit program must submit (1) "a full and complete description of the program it proposes to establish under and administer under State law" and (2) "a statement from the attorney general" that the laws of the State "provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b).

CWA Section 402(b) thus prescribes "a system for the mandatory approval of a conforming State program." *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). If a State's program satisfies the enumerated criteria, EPA must approve the State's application. EPA found that Arizona had met all the requirements of CWA Section 402(b) and approved the State of Arizona's application to administer the NPDES permit program. Yet the Ninth Circuit invalidated the transfer because, according to the Ninth Circuit, EPA should have considered a tenth criterion—the effect of the transfer on threatened and endangered species.

The Ninth Circuit held that EPA violated ESA Section 7(a)(2) because EPA did not analyze the effects of the loss of Section 7 consultation when EPA transferred the permit program to Arizona. The court of appeals invalidated EPA's approval of the transfer on the grounds that ESA Section

7(a)(2) overrides the requirements of CWA Section 402(b).[3] The court of appeals concluded that EPA's approval of Arizona's Section 402(b) program was the legally relevant cause of impacts to endangered species that would result from the State's issuance of NPDES permits for State-permitted land use activities.

The criteria established by Congress in CWA Section 402(b) for delegation of permitting authority to States do not include impacts to listed species or to habitat designated as critical in accordance with ESA Section 4(a)(3). Congress mandated that EPA transfer permitting authority to the States once the nine criteria are met. After NPDES permitting authority is transferred to the State, EPA may only object to a State-issued permit if the permit is "outside the guidelines and requirements" of the CWA.[4] 33 U.S.C. § 1342(d)(2).

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[3] This Court directed the parties to address the additional question of whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona was arbitrary and capricious and, if so, whether the court of appeals should have remanded to EPA without ruling on the interpretation of ESA Section 7(a)(2). The Court need not remand because an agency has broad discretion to change its position so long as it articulates a rational basis for its view. The relevant federal agencies have concluded that, because CWA Section 402(b) requires that the State's application be granted if the nine criteria are satisfied, the decision whether to approve the transfer is not subject to the ESA Section 7(a)(2) consultation requirements. *See* Petition for a Writ of Certiorari of United States Environmental Protection Agency App. at 93a-102a, *U.S. EPA v. Defenders of Wildlife*, (U.S. Oct. 23, 2006) (No. 06-549) (hereinafter "App."). FWS and NMFS have further confirmed that agency conduct mandated by another Act of Congress, here, the CWA, is not subject to "discretionary Federal involvement or control" within the meaning of 50 C.F.R. § 402.03. *See* App. 103a-116a. Because the agencies have articulated "'a satisfactory explanation for [their] action[s]' including a 'rational connection between the facts found and the choice made,'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted), a remand is not appropriate.

[4] The court of appeals' decision creates procedural and substantive uncertainty for permittees holding State-issued permits. Permittees must

This reflects Congress's careful consideration of the issue and its final decision to grant States the right to administer NPDES permit programs under State law so long as the program meets the requirements of CWA Section 402(b).[5] The court of appeals' decision, however, overrides the CWA's directive that EPA "shall approve" a State transfer application that satisfies the nine criteria and effectively imposes a tenth criterion. The Ninth Circuit's holding is erroneous and should be overturned by this Court.

A. The Clean Water Act Splits Federal and State Authority to Promote Water Quality Objectives.

The Federal Water Pollution Control Act Amendments of 1972, known as the CWA, 33 U.S.C. §§ 1251-1387, are predicated on "a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). After emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pol-

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comply with State-specific procedural rules governing permit applications and drafting, public notice requirements, issuance and appeals. Permittees must also comply with technology-based and water quality-based limits and conditions of State-issued permits, and meet applicable State resource agencies' statutory and regulatory requirements. The State delegation program under CWA Section 402(b) not only implements the cooperative federalism of the CWA—it also relieves EPA from a substantial administrative burden.

[5] "After the Administrator [of EPA] has promulgated the guidelines and requirements for a State permit program, the Governors of the individual States desiring to administer their own permit program may submit to the Administrator a full and complete description of the planned integrated State permit program. If the Administrator determines that a State has the authority to issue permits consistent with the act, he shall approve the submitted program. In that event, the States, under State law, could issue State discharge permits." HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMM. (Oct. 4, 1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 261-62 (1973) (Statement of Rep. Wright).

lution [and] to plan the development and use . . . of land and water resources . . .," the Act specifies that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources."[6] 33 U.S.C. § 1251(b), (g). Congress balanced many concerns in the CWA to achieve "cooperative federalism," by conveying some authority to EPA, delegating some to the States, and creating mechanisms to shift authority between the two.

For example, States are primarily responsible for adopting and periodically revising water quality standards. 33 U.S.C. § 1313(a), (c)(2)(A). Those standards must "be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . also taking into consideration their use and value for navigation." *Id.* States must then submit their standards to EPA for approval. If EPA determines that a State's standards are not consistent with the CWA, the Agency must so inform the State within 90 days following the State's submission. If the State does not adopt changes necessary to meet the applicable statutory requirements within 90 days following EPA's notice, then EPA has a mandatory duty to establish replacement federal standards. 33 U.S.C. § 1313(c)(3), (4).

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[6] "[I]t is [the legislators'] intent that the act be administered in such a manner that the abilities of the States to control their own permit programs will be developed and strengthened. They look for and expect State and local interest, initiative, and personnel to provide a much more effective program than that which would result from control in the regional offices of the [EPA]." HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMM. (Oct. 4, 1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 262 (1973) (Statement of Rep. Wright).

States bear primary responsibility for assessing the quality of their waters and developing water quality standards (from which water-quality based permit limits are derived). States also develop total maximum daily loads ("TMDLs") for any waters identified as not meeting applicable water quality standards and then implement TMDLs through NPDES permits. 33 U.S.C. § 1313(d)(1)(A)-(D). As with the underlying water quality standards, EPA is responsible for reviewing and approving State water quality assessments and TMDLs. 33 U.S.C. § 1313(d)(2).

Congress devised the NPDES permitting program as a mechanism for implementing the water quality-based tools that are adopted by States, as well as other technology-based tools adopted by EPA. Recognizing that the content of these permits is dictated, in large part, by State-specific needs and requirements (*e.g.*, water quality standards, assessments, and TMDLs), Congress prescribed, in the CWA, the procedure for EPA to transfer its administration of the NPDES permit program to a qualifying State that meets the nine statutory criteria. The transfer of the program by EPA to a qualifying State is mandatory.

Since 1972, EPA has delegated NPDES permitting authority to 45 States. These States serve a vital role in administering the NPDES permit program and furthering our Nation's water quality objectives. Further, there is no basis to assume that NPDES permits issued in by delegated States, including Arizona, will cause harm to listed species. The ESA prohibits the "take" of endangered and threatened species and that "take" prohibition applies to both federal and non-federal acts. *See* 16 U.S.C. § 1538. Activities that require NPDES permits may also involve some form of federal action that will trigger consultation, for example, if the activities occur on federal land or require a CWA Section 404 permit issued by the U.S. Army Corps of Engineers. Therefore, it is wrong to assume that the absence of federal administration of the

NPDES program will lead to harm for listed species. Endangered or threatened species or their designated critical habitat may still be subject to the consultation requirements of ESA Section 7(a)(2) due to other federal statutory or permitting requirements.

The Ninth Circuit reads ESA Section 7(a)(2) to superimpose consultation requirements that may otherwise prohibit mandatory federal action under the CWA. Applying the ESA consultation process to EPA's delegation of NPDES programs to the States will "sabotage the delicate machinery that Congress designed" to delegate these programs.[7] *Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986). This frustrates Congress's legislative intent. Congress could have included a consultation requirement among the statutory criteria for NPDES program delegation; it did not.[8] If the Ninth Circuit decision stands, it will carry with it uncertainty, disruption,

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[7] In *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986), the Ninth Circuit upheld a grant of summary judgment to EPA in a challenge to enjoin EPA from continuing to register certain herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The court found that the differences between FIFRA's registration procedure and the National Environmental Policy Act's (NEPA") requirements indicated that Congress did not intend NEPA to apply. *Id.* at 778-80. The court determined that "[t]o apply NEPA to FIFRA's registration process would sabotage the delicate machinery that Congress designed to register new pesticides," and would increase a regulatory burden that Congress had intentionally lightened. *Id.* at 779.

[8] Several environmental statutes explicitly command the federal agency administering the statute to approve State regulatory programs that satisfy certain statutory requirements, including the Resource Conservation and Recovery Act ("RCRA"); *see* 42 U.S.C. § 6926(b) (allowing for authorization of State hazardous waste program); the Solid Waste Disposal Act ("SWDA"), *see* 42 U.S.C. § 6991c(a) (regulation of underground storage tank release, detection, prevention, and correction programs); and FIFRA, *see* 7 U.S.C. § 136i(a)(2) (regulation of applicators of pesticides).

and delay, impeding the cooperative federalism that is at the core of the CWA.[9]

B. ESA Section 7(a)(2) Applies Only to Discretionary Acts and Therefore Does Not Apply to CWA Section 402(b).

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). A federal agency's duty under ESA Section 7(a)(2) is to ensure that endangered or threatened species are not jeopardized by actions attributable to the agency itself. Regulations jointly promulgated by the Secretaries of Commerce and the Interior interpret ESA Section 7(a)(2) to require consultation on actions "in which there is *discretionary* Federal involvement or control."[10] 50

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[9] Other statutes outside the environmental context contain cooperative federal-state provisions. For example, under the Medicaid statute, in order to receive federal funding, a State must first obtain from the Department of Health and Human Services ("HHS") approval of a State plan to provide healthy services to indigents in that State; to obtain federal approval from HHS, the State plan must satisfy a lengthy list of statutory requirements. *See* 42 U.S.C. § 1396a. The federal welfare laws also provide examples of such cooperative federal-state arrangements, including programs under Temporary Assistance to Needy Families, 42 U.S.C. § 602; Child Welfare Services, 42 U.S.C. § 622; Promoting Safe and Stable Families, 42 U.S.C. § 629(b); Child Support and Establishment of Paternity, 42 U.S.C. § 654; and Foster Care and Adoption, 42 U.S.C. § 671. Each of these state-run programs, like Medicaid, must be approved by HHS before a State can receive federal funding. Arguably, if the Ninth Circuit's decision stands, those programs could be deemed subject to the ESA.

[10] The construction of Section 7(a)(2) of the ESA reflected in 50 C.F.R. §§ 402.02 and 402.03 is reasonable and entitled to deference. *See, e.g.*,

C.F.R. § 402.03 (emphasis added); *see Marbled Murrelet*, 83 F.3d at 1073. ESA Section 7(a)(2) does not confer independent authority on federal agencies to act for the benefit of listed species; rather, it directs the agencies to consult on actions where the agencies have discretionary authority.

The court of appeals wrongly held that ESA Section 7(a)(2) applies even if the law governing the conduct of the agency gives the agency no discretion to modify its action. Where the agency has no discretion to act because the conduct is mandated by an Act of Congress, the act itself cannot constitute "agency action" within the meaning of Section 7 of the ESA. The Service's regulation, 50 C.F.R. § 402.03, effectuates this Congressional intent. The court of appeals' decision thwarts that intent and nullifies the regulation.

II. THE NINTH CIRCUIT'S OPINION IS AN ANOMALY THAT MUST BE REVERSED.

Only the Ninth Circuit has held that the ESA overrides statutory limitations on an agency's authority. The decision conflicts with the decisions of virtually every other court that has considered the issue, including decisions within the Ninth Circuit.

A. The Court of Appeals Misapplied the Causation Analysis of *Public Citizen*.

Under the regulations, an agency is required to take into account only those effects that are "caused" by its actions, including indirect effects. *See* 50 C.F.R. § 402.02 (defining "indirect effects" as "those that are caused by the proposed action and are later in time, but still are reasonably certain to

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Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'"); *United States v. Mead*, 533 U.S. 218 (2001).

occur"). Where, as here, the effects flow from a statutory mandate, those effects are caused by Congress, not by the agency's action. The court of appeals, however, found EPA's transfer of CWA permitting authority to be the "cause" of all effects that may flow from land uses that require State-issued NPDES permits. That holding is erroneous; EPA's act of transferring the NPDES permit program to the State does not proximately cause impacts to listed species.

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Court considered whether, under NEPA and the Clean Air Act ("CAA"), the Federal Motor Carrier Safety Administration ("FMCSA") is required to evaluate the effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur. *Id.* at 756. *Public Citizen* is relevant here because of the Court's analysis of causation: "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. The *Public Citizen* standard, therefore, should be applied to determine whether EPA's action is the "legally relevant 'cause' of," *id.*, effects on listed species and any designated critical habitat.

The Ninth Circuit cited *Public Citizen* but misunderstood its import. The court of appeals erroneously held that all impacts resulting from private development under NPDES permits Arizona might issue would be caused by EPA's transfer decision. They are not. CWA Section 402(b) mandates that EPA "shall approve each such submitted program" unless EPA "determines that adequate authority does not exist" to administer the program in accordance with the nine criteria. Thus, EPA is not the cause of any harm that may result from activities that are authorized by NPDES permits issued legally by Arizona after the transfer of the NPDES

permitting program occurs. Rather, as FWS concluded in the Biological Opinion, the cause of any potential impacts is Congress's decision, in the CWA, to limit EPA's discretion by requiring transfer of the program where the criteria in CWA Section 402(b) are met.[11] This conclusion is consistent with the meaning of *Public Citizen*.

B. Other Circuits Have Properly Construed ESA Section 7(a)(2) to Apply Only to Discretionary Actions.

The court of appeals' decision directly conflicts with the Fifth Circuit's decision in *American Forest and Paper Ass'n v. U.S. EPA*, 137 F.3d 291 (5th Cir. 1998) ("*AFPA*") and the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maint. Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) ("*Platte River*"). Both courts properly construed ESA Section 7(a)(2) and held that the ESA does not supersede constraints or override statutory mandates applicable to federal agencies.[12]

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[11] The Fish and Wildlife Service correctly concluded that the act of transferring the program to the State could not be a "cause" of any impacts to species:

> [The] loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal [Clean Water Act] permits reflects Congress's decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Defenders of Wildlife, 420 F.3d at 953 (quoting the Biological Opinion).

[12] The Ninth Circuit decision also conflicts with a decision from the Eighth Circuit where the court observed that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority." *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005).

AFPA involved EPA's approval of Louisiana's NPDES permitting program under CWA Section 402(b), the precise agency action at issue in the case at bar. As part of its approval of the Louisiana program, EPA added a condition that Louisiana consult with FWS and NMFS before issuing permits. After reviewing Section 402(b), the Fifth Circuit held that the CWA prescribed the factors to be considered by EPA, and the ESA, therefore, could not trump the mandatory character of the CWA transfer provision or supplant the criteria considered for approving transfers under the CWA. "The language of [CWA Section] 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements." *Id.* at 297. The court thus concluded that "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction." *Id.* at 299.

The D.C. Circuit has similarly reasoned that ESA Section 7 consultation is effectively limited by an agency's statutory authority. In *Platte River*, environmental groups brought a challenge to annual licenses issued to two hydroelectric projects on the Platte River by the Federal Energy Regulatory Commission ("FERC"). Under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, FERC was precluded from amending the annual licenses given to a hydroelectric plant. For that reason, FERC could not insert conditions to protect wildlife into the licenses when they were renewed. *Platte River*, 962 F.2d at 32.

The groups argued that, notwithstanding the statutory limits of the Federal Power Act, FERC had an affirmative obligation to impose conditions to protect listed species under ESA Section 7(a)(2). *Id.* at 33. The D.C. Circuit rejected that argument: "[T]he statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not

expand the powers conferred on an agency by its enabling act." *Id.* at 34 (emphasis in original).[13]

The panel below acknowledged that there was "an existing intercircuit conflict on the question before us," comparing *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989) and *Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir. 1979) with *AFPA* and *Platte River*. The court of appeals did not find the D.C. Circuit and Fifth Circuit decisions persuasive, but instead said it was relying on decisions from the First and

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[13] The Ninth Circuit's decision is also counter to several prior Ninth Circuit decisions holding that non-discretionary actions do not trigger Section 7 consultation obligations. *See, e.g., Western Watersheds Project v. Matejko*, 456 F.3d 922 (9th Cir. 2006) (duty to consult is only triggered where there is discretionary action; BLM's decision not to exercise discretionary authority and regulate private diversions of water is not an "action" within the meaning of ESA Section 7(a)(2), and BLM did not retain discretion to regulate diversions for benefit of listed species); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (Navy need not consult on the operation of a new missile program where there is no agency discretion to act because consultation "would be an exercise in futility"); *Environmental Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001) (FWS was not required to reinitiate consultation under ESA Section 7(a)(2) because it had not retained discretionary control over an earlier-issued incidental take permit sufficient to require the recipient of that permit to take steps that would inure to the benefit of the listed species); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("Where there is no agency discretion to act, the ESA does not apply."); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (FWS advisory letter did not constitute a "federal action" triggering a duty to consult under ESA Section 7 because "there was no discretionary federal involvement or control over the Lumber Companies' proposed salvage operations"); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (Bureau of Land Management approval of road construction was not a "discretionary" action triggering consultation responsibilities where the federal agency lacks "the ability to implement measures that inure to the benefit of the protected species").

Eighth Circuits. *Defenders of Wildlife*, 420 F.3d at 970. As Judge Kozinski explained in his dissent from the court of appeals' denial of en banc review, those cases are inapposite:

> The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does.

Defenders of Wildlife v. U.S. EPA, 450 F.3d 394, 401 n.5 (9th Cir. 2006) (emphasis in original).

Conservation Law Foundation involved the sale of offshore leases for oil and gas exploration under the Outer Continental Shelf Lands Act ("OCSLA"). 623 F.2d at 714. Conservation organizations argued that, once the leases were sold, the Secretary would lose the ability to protect natural resources under the strict standards of the ESA because the Secretary would be forced to comply with the less stringent standards of the OCSLA. *Id.* at 715. The Secretary countered that the ESA and the OCSLA are complementary, and that the ESA would continue to apply "of its own force" because the Secretary would have discretionary authority over the leases. *Id.* The First Circuit agreed. *Id.* Similarly, in *Defenders of Wildlife v. Administrator, EPA*, the Eighth Circuit held that EPA was not exempt from compliance with the ESA under FIFRA, 7 U.S.C. §§ 136-136y. 882 F.2d at 1294. Neither decision addressed whether ESA Section 7(a)(2) overrides statutory constraints placed on an agency by another Act of Congress because in both cases the ESA was complementary to the statute authorizing the agency action. Therefore, the court of appeals' reliance on *Conservation Law Foundation* and *Defenders of Wildlife v. Administrator, EPA* is misplaced.

The Ninth Circuit goes even further and reads the ESA to create an independent, affirmative obligation in contra-

vention of the requirements of the CWA. "The EPA may have complied with its obligations under the Clean Water Act, but compliance with a 'complementary' statute cannot relieve the EPA of its *independent obligations* under section 7(a)(2)." *Defenders of Wildlife*, 420 F.3d at 971 (emphasis added). If the decision is not reversed, an agency may be obliged to act even though its organic statute says it may not. This cannot be the law.

C. The Decision Creates Uncertainty About the Application of ESA Section 7(a)(2) to Federal Agencies' Non-Discretionary Acts.

The court of appeals' decision may have far-reaching implications for many agency actions. Litigation has been brought over the scope of the Bureau of Reclamation's discretion to act under its water contracts and its responsibilities under ESA Section 7(a)(2). In each of these cases, the courts have found that, where Reclamation has no discretion to alter water deliveries because of applicable law or contract, it is not subject to ESA Section 7(a)(2). By finding that "the ESA applies to anything 'authorized, funded, or carried out, by a federal agency, . . . whether discretionary or not," 450 F.3d at 398 (Kozinski, J.), the court of appeals' holding calls into question existing contracts that *Amici* hold with Reclamation and other federal agencies, creating uncertainty about the relationship of ESA Section 7(a)(2) to these long-standing arrangements.

This issue was considered in *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003),[14] where the plaintiffs challenged Reclamation's management of the lower Colorado River, arguing that Reclamation should send more

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[14] *Amici* APA and CAWCD filed an amicus-brief in *Defenders of Wildlife v. Norton* on the proper scope of Reclamation's discretion and how it should be viewed in light of the ESA.

water to Mexico for the benefit of listed species found there. Reclamation initiated informal consultation under ESA Section 7(a)(2), but concluded that no formal consultation was required because it lacked discretion over water deliveries to or within Mexico under applicable treaties and this Court's decision in *Arizona v. California*, 376 U.S. 340 (1964). 257 F. Supp. 2d at 66. The district court agreed, finding that Reclamation had no authority to deliver water for the benefit of species in Mexico:

> The record contains no suggestion of a way, with or without consultation [under Section 7(a)(2) of the ESA], for Reclamation to ensure that more water reaches the listed species in [Mexico]. The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation's authority.

Id. at 67-68 (citing *Arizona v. California*, 376 U.S. 340 (1964)). Thus, due to the limited scope of Reclamation's discretion under the Law of the River,[15] the court held that consultation under ESA Section 7(a)(2) was not required because no delivery of water to benefit species in Mexico was allowed:

> [I]t seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water.

Id. at 69.

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[15] The Law of the River collectively refers to the treaties, compacts, laws, court decrees and contracts that govern the allocation and use of Colorado River water.

The Rio Grande River has also been the subject of litigation considering the application of the ESA to Reclamation contracts. In *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, Case No. 05-2399 (and consolidated cases) (10th Cir. filed Dec. 29, 2005) ("*Silvery Minnow*"), the U.S. Court of Appeals for the Tenth Circuit is faced with a similar issue arising from a district court decision misconstruing the ESA to override Reclamation's obligations under existing contracts on the Rio Grande.[16] In *Silvery Minnow*, plaintiffs sought to require Reclamation to release water or to restrict diversions of water, in contravention of its existing contracts, for the benefit of the silvery minnow. Reclamation argued that water on the Rio Grande was fully allocated and it had no discretion under its existing contracts to release water for the silvery minnow.

The district court rejected that argument and ordered Reclamation to make releases or restrict diversions. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222 (D.N.M. 2002). In doing so, the district court erroneously transmuted the ESA's requirement that Reclamation consult on its discretionary actions into a substantive command that Reclamation unilaterally divert contractually-allocated water away from long-standing Reclamation contractors for the benefit of the silvery minnow.[17] The 10th Circuit must now determine what federal actions are properly subject to ESA Section 7(a)(2) consultation.

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[16] *Amici* APA and CAWCD filed an amicus brief in support of the United States in *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, No. 05-2399 (10th Cir. filed June 26, 2006).

[17] Of course, there is always room for Reclamation or local authorities to take voluntary action to acquire water supplies or resources from willing sellers to benefit protected species.

CONCLUSION

For all of the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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